TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 528.

WALTER N. DIMMICK, APPELLANT,

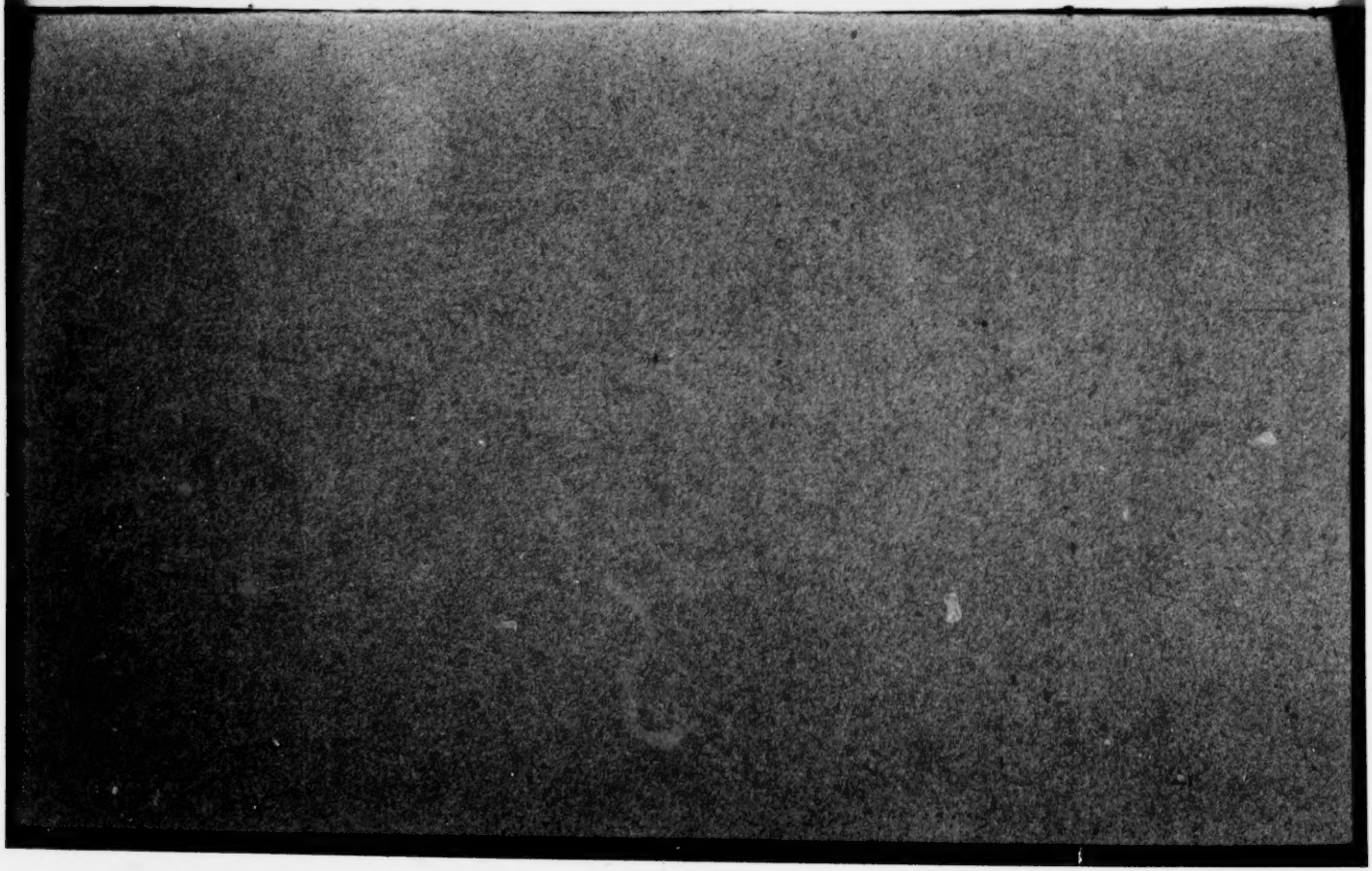
vs.

JOHN W. TOMPKINS, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED DECEMBER 31, 1908.

(19,179.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 10, 1904.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the Matter of the Petition and Complaint of WALTER N. DIMMICK for the Writ of *Habeas Corpus*.

Petition and Complaint for Writ of Habeas Corpus.

o the honorable the circuit court of the United States, ninth judicial circuit, northern district of California:

The petition and complaint of Walter N. Dimmick respectfully ows to your honorable court that he is illegally and unlawfully prisoned and restrained of his liberty in the State prison of the d State of California at San Quentin, by John W. Tompkins, Esq., e warden of said prison. That the said imprisonment is illegal d unlawful and in contravention of the Constitution of the United ates, to wit: article V of the amendments to the Constitution, in is: That heretofore on the 16th day of October A. D. 1901, the d Walter N. Dimmick was sentenced to imprisonment in said State ison by the district court of the United States in and for the north- n district of California, for the period of two years to date from the d 16th day of October A. D. 1901. That the said Walter N. Dim- ick has been imprisoned under said judgment, in the said State ison ever since the 13th day of April A. D. 1903; and previously ereto and from the date of said judgment to the said 13th day of pril A. D. 1903, he was imprisoned under said judgment in the county jail of the county of Alameda, by the order of the said district court. That the said Walter N. Dimmick has earned by good behavior in said prison and received credits on said ntence and term of imprisonment amounting to the period of enty-five days and the same have never been forfeited.

That on the records of the said prison the said Walter N. Dim- ick has been duly credited by the warden thereof upon said ntence and term of imprisonment, with said period of twenty-five ys. That notwithstanding the foregoing facts and the expiration said term of imprisonment, the said warden arbitrarily refuses to scharge and release the said Walter N. Dimmick from said im- isonment, and restrains him of his liberty without his consent and ainst his will. That the said Walter N. Dimmick is not detained said prison upon any writ, process or judgment or order of any urt or judge other than said judgment. That the term of im- isonment prescribed by said judgment expired on the 21st day of ptember A. D. 1903, according to the credits allowed the said alter N. Dimmick as aforesaid, and by virtue of the provisions of ction five thousand five hundred and forty-four of the Revised atutes of the United States; and in any event expired according

to its very terms, on the 16th day of October A. D. 1903. That the following is a true copy of the said judgment of the said district court of the United States, viz:

"At a stated term of the district court of the United States for the "northern district of California, held at the court-room, in the city "and county of San Francisco, on Wednesday, the 16th day of Octo- "ber 1901.

"Present: The Honorable John J. De Haven, judge.

"THE UNITED STATES OF AMERICA
vs.
"WALTER N. DIMMICK, Defendant.

3 "Convicted of making and presenting false claim as charged "in first count of indictment, and using a portion of pub- "lic moneys of the United States, to wit, the sum of $498.37, for "a purpose not prescribed by law, as charged in the fourth count "of the indictment (sections 5438 and 5497, R. S. U. S.).

"*Judgment on Verdict of Guilty on First and Fourth Counts of Indictment.*

"Marshall B. Woodworth, Esq., United States attorney; S. C. "Denson, Esq., and Bert Schlesinger, Esq., special assistants United "States attorney, and the defendant, with George D. Collins, Esq., "his attorney, came into court. The defendant was duly informed "by the court of the nature of the indictment, filed on the 16th day "of September A. D. 1901, charging him with making and present- "ing false claim, etc., and using a portion of public moneys of the "United States for a purpose not prescribed by law; of his arraign- "ment and plea of not guilty; of his trial and the verdict of the "jury on the 12th day of October, 1901, to wit:

"'We the jury, find the isoner at the bar guilty on the first "'and fourth counts of the indictment, and not guilty on the third "'count of the indictment.'

"The defendant was then asked if he had any legal cause to show "why judgment should not be pronounced against him, and no suf- "ficient cause being shown or appearing to the court, thereupon the "court rendered its judgment:

"That whereas the said Walter N. Dimmick having been duly "convicted in this court of making and presenting false claim, as "charged in the first count of the indictment, and using a portion "of public moneys of the United States, to wit, the sum of
4 "$498.37, for a purpose not prescribed by law, as charged in "the fourth count of the indictment:

"It is therefore ordered, adjudged and decreed that the said "Walter N. Dimmick be and he is hereby sentenced to be im- "prisoned at hard labor for the term of two years from October 16th

"1901; and it — further ordered that said sentence of imprison-
" ment be executed upon the said Walter N. Dimmick by imprison-
" ment in the State prison of the State of California, at San Quentin,
" Marin county, California.

" JOHN J. DE HAVEN,
" *United States District Judge,*
" *Northern District of California.*"

That the following is a true copy of the indictment referred to in the said judgment and filed in said criminal action, viz:

" *Indictment.*

" In the District Court of the United States in and for the Northern
" District of California.

"At a stated term of said court begun and holden at the city and
" county of San Francisco, State and northern district of California,
" on the second Monday of July, in the year of our Lord one thou-
" sand nine hundred and one.

" The grand jurors of the United States of America within and
" for the district aforesaid, on their oath, present: That Walter N.
" Dimmick, late of the northern district of California, hereto-
" fore, to wit, on the seventh day of April, in the year of our
" Lord one thousand nine hundred, at the city and county of
" San Francisco, State and northern district of California, then
" and there being, did then and there, knowingly, unlawfully, and
" feloniously, make and cause to be made and present and cause
" to be presented for payment to a person and officer in
" the civil service of the United States, to wit, to one W. K.
" Cole, who was then and there cashier of the mint of the
" United States of America at San Francisco, and who was author-
" ized to pay the claim herein referred to, a certain false, fictitious,
" and fraudulent claim against the United States of America, to wit,
" a claim for the sum of four hundred and ninety-eight and thirty-
" seven one-hundredths ($498.37) dollars, the said sum being for four
" thousand nine hundred and ninety-seven (4,997) pounds of sheet
" lead and one thousand nine hundred and eleven (1,911) pounds of
" lead pipe, which said sheet lead and lead pipe had theretofore been
" purchased at San Francisco, within the State and northern dis-
" trict aforesaid, by the United States for the mint of the United
" States at San Francisco, within the State and northern district
" aforesaid, from the Selby Smelting and Lead Company, a corpora-
" tion, a copy of which said claim is annexed to this indictment and
" made a part hereof and marked Exhibit "A;" and the grand
" jurors do further say that the particular items of said false, fictitious,
" and fraudulent claim appear in said Exhibit " A;" that the said
" claim was then and there, to wit, at the time and place of presen-

" tation thereof for payment, as hereinbefore stated, false, fictitious,
" and fraudulent in this: that the said claim had theretofore and on
" the twenty-sixth day of March, in the year of our Lord one thou-
" sand nine hundred, been wholly paid by the United States, and
" the articles set out in said claim had theretofore, to wit, on said last-
" mentioned date, been fully paid for by the said United States,
" and that at the time and place of making the said claim and
" presenting the same for payment the said claim was not due
" or owing by the said United States to the Selby Smelting
" and Lead Company, or to any other person, and was not
6 " due or owing at all; that on the twenty-sixth day of March,
" in the year of our Lord one thousand nine hundred the
" said Selby Smelting and Lead Company aforesaid had received
" from the United States of America the said sum of four hundred and
" ninety-eight and thirty-seven one-hundredths ($498.37) dollars, in
" full and complete payment of said claim and of the articles set out
" therein, and the said Selby Smelting and Lead Company had no
" other or further charge or claim against the United States of
"America or against the mint of the United States of America at
"San Francisco, State and northern district aforesaid, on account of
" said claim or for the sale of the articles therein set out. The said
" Walter N. Dimmick then and there, at the time and place of
" the presentation of said claim, as aforesaid, well knew that said
" claim was false, fictitious, and fraudulent, as aforesaid, and well
" knew that said claim had been paid on said twenty-sixth day of
" March, in the year of our Lord one thousand nine hundred, and
" then and there well knew that on the twenty-sixth day of March,
" in the year of our Lord one thousand nine hundred, the said Selby
" Smelting and Lead Company aforesaid had received from the
" United States of America the said sum of four hundred and ninety-
" eight and thirty-seven one-hundredths ($498.37) dollars in full and
" complete payment of said claim and of the articles set out therein,
" and he then and there well knew that the said Selby Smelting and
" Lead Company had no other or further charge or claim against
" the United States or against the mint of the United States at San
" Francisco, State and northern district aforesaid, on account of said
" claim or for the sale of the articles therein set out, and he, the said
" Walter N. Dimmick, intended then and there and thereby to de-
" fraud the United States of America—
7 " Against the peace and dignity of the United States of
" America and contrary to the form of the statutes of the said
" United States of America in such case made and provided.

" *Second Count.*

" And the grand jurors aforesaid, on their oath aforesaid, do
" further present: That Walter N. Dimmick, late of the northern
" district of California, heretofore, to wit, on the third day of Jan-

"uary, in the year of our Lord one thousand nine hundred, at the "city and county of San Francisco, State and northern district of "California, then and there being, did then and there, knowingly, "unlawfully, and feloniously, make and cause to be made, and "present and cause to be presented for payment, to a person and "officer in the civil service of the United States, to wit, to one W. "K. Cole, who was then and there cashier of the mint of the United "States of America at San Francisco, and was authorized to pay the "claim herein referred to, a certain false, fictitious, and fraudulent "claim against the United States of America, to wit, a claim for "the sum of four hundred and ninety-eight and thirty-seven one-"hundredths ($498.37) dollars, the said sum being for four thou-"sand nine hundred and ninety-seven (4,997) pounds of sheet lead "and one thousand nine hundred and eleven (1,911) pounds of "lead pipe, which said sheet lead and lead pipe had theretofore "been purchased at San Francisco, within the State and northern "district aforesaid, by the United States for the mint of the "United States at San Francisco, within the State and northern "district aforesaid, from the Selby Smelting and Lead Company, "a corporation, a copy of which said claim is annexed to this indict-
"ment and made a part hereof and marked Exhibit "A;" and
8 "the grand jurors do further say that the particular items of
"said false, fictitious and fraudulent claim appear in said Ex-"hibit "A;" that the said claim was then and there, to wit, at the "time and place of presentation thereof for payment, as hereinbefore "stated, false, fictitious and fraudulent, in this: that the said claim "had theretofore and on the twenty-sixth day of March, in the year "of our Lord one thousand nine hundred, been wholly paid by the "United States, and the articles set out in said claim had thereto-"fore, to wit, on said last mentioned date, been fully paid for by the "United States, and that at the time and place of making the said "claim and presenting the same for payment the said claim was not "due or owing by the said United States to the Selby Smelting and "Lead Company, or to any other person, and was not due or owing "at all; that on the twenty-sixth day of March, in the year of our "Lord one thousand nine hundred, the said Selby Smelting and "Lead Company aforesaid had received from the United States of "America the said sum of four hundred and ninety-eight and thirty-"seven one-hundredths ($498.37) dollars in full and complete pay-"ment of said claim and of the articles set out therein, and the said "Selby Smelting and Lead Company had no other or further "charge or claim against the United States of America, or the mint "of the United States at San Francisco, State and northern district "of California, on account of said claim or for the sale of the articles "therein set out. The said Walter N. Dimmick then and there, at "the time and place of presentation of said claim, well knew that "said claim was false, fictitious, and fraudulent, as aforesaid, and "well knew that said claim had been paid on the said twenty-sixth "day of March in the year of our Lord one thousand nine

"hundred, and he the said Walter N. Dimmick, intended
9 "then and there and thereby to defraud the United States of
"America; and for the purpose of obtaining and aiding to
"obtain the payment of said claim aforesaid, then and there know-
"ing it to be false, fictitious, and fraudulent, the said Walter N.
"Dimmick did knowingly, unlawfully, and feloniously use and
"cause to be used, and presented and caused to be presented, on
"said third day of January, in the year of our Lord one thousand
"nine hundred, at the city and county of San Francisco, State and
"northern district of California, to a person and officer in the civil
"service of the United States, to wit, to one W. K. Cole, who was
"then and there cashier of the mint of the United States, and who
"was then and there a person authorized to pay the claim herein
"referred to, a certain false bill, receipt, voucher, and account, to
"wit, a certain false bill, receipt, voucher, and account from the
"Selby Smelting and Lead Company, a corporation, to the mint of
"the United States at San Francisco, State and northern district of
"California, a copy of which said false bill, receipt, voucher, and
"account is annexed to this indictment and marked Exhibit "A"
"and is hereby made a part of this count; that the said Walter N.
"Dimmick, at the time of using and causing to be used said false
"bill, receipt, voucher, and account, as aforesaid, for the purpose of
"obtaining and aiding to obtain the payment of said claim, then
"and there well knew that said bill, receipt, voucher, and account
"was false, fictitious, and fraudulent, in this: that he then
"and there well knew that the claim set out in said bill, re-
"ceipt, voucher, and account had on the twenty-sixth day of
"March, in the year of our Lord one thousand nine hundred,
"been fully paid by the United States, and he then and there
"well knew that all the articles referred to in said
10 "bill, receipt, voucher, and account had been paid by the
"United States to the said Selby Smelting and Lead Company
"on the said twenty-sixth day of March, in the year of our Lord
"one thousand nine hundred, aforesaid, and he then and there well
"knew that the said Selby Smelting and Lead Company then and
"there had no claim or charge against the United States of America
"or against the mint of the United States at San Francisco for the
"articles referred to in said false, fictitious, and fraudulent bill,
"receipt, voucher, and account—

"Against the peace and dignity of the United States of America
"and contrary to the form of the statute of the said United States of
"America in such case made and provided.

Third Count.

"And the grand jurors, on their oath aforesaid, do further pre-
"sent: That Walter N. Dimmick, late of the northern district of
"California, heretofore, to wit, on the thirteenth day of April, in the

"year of our Lord one thousand nine hundred, at the city and "county of San Francisco, in the State and northern district of "California, then and there being, was then and there a clerk of "the United States mint at San Francisco, State of California, in "the district aforesaid, and was known and designated as chief "clerk of said mint, and as such clerk received and had in his pos- "session a sum of money, to wit, the sum of four hundred and "ninety-eight and thirty-seven one-hundredths dollars ($498.37), "lawful money of the United States of America, and of the value of "four hundred and ninety-eight and thirty-seven one-hundredths "($498.37) dollars, which money was then and there the property
"of the United of America, and unlawfully and feloniously
11 "did then and there embezzle and wrongfully convert the
"same to his own use—

"Against the peace and dignity of the United States of America "and contrary to the form of the statutes of the said United States "in such case made and provided.

"*Fourth Count.*

"And the grand jurors aforesaid, on their oath aforesaid, do fur- "ther present: That Walter N. Dimmick, late of the northern dis- "trict of California, heretofore, to-wit, on the seventh day of April, "in the year of our Lord one thousand nine hundred, and at divers "other times from and including the said seventh day of April, in "the year of our Lord one thousand nine hundred, to and including "the thirtieth day of April, in the year of our Lord one thousand "nine hundred, at the city and county of San Francisco, in the State "and northern district of California, then and there being, was "then and there a clerk of the mint of the United States at San "Francisco, State of California, in the district aforesaid, and was not "an authorized depositary of public moneys of the United States, "then and there knowingly, unlawfully, willfully, and feloniously "used a portion of the public moneys of the United States of "America, to wit, the sum of four hundred and ninety-eight and "thirty-seven one-hundredths ($498.37) dollars, lawful money of the "United States of America, for a purpose not prescribed by law— "that is to say, the said Walter N. Dimmick then and there used the "said money for his own uses and purposes—

"Against the peace and dignity of the United States of America "and contrary to the form of the statute of the said United States "of America in such case made and provided.

"MARSHALL B. WOODWORTH,
"*United States Attorney.*

12 "Sections 5438, R. S. U. S.; 5497, R. S. U. S., and the act
"of Congress of March 3, 1875, vol. 1, Supp. Rev. Stat. of the
"U. S., page 88, 2nd. ed.

"Names of the witnesses examined before the said grand jury on "finding the foregoing indictment: Wm. K. Cole, Theodore Gray, "Frank A. Leach.

"(Endorsed:) A true bill. T. C. Masteller, foreman. Presented "and filed in open court this 16th day of September, A. D. 1901. "Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

"EXHIBIT 'A.'

"Terms: Payable in U. S. gold coin, with San Francisco ex- "change.

"These goods are at risk of purchaser after delivery at dock or "depot at point of shipment. All errors or shortages must be re- "ported on receipt of goods. When practicable, all packages are "marked with gross and net weight. In case of differences, please "report which package varies.

"SAN FRANCISCO, CAL., 13 *March*, 1900.

"United States mint, San Francisco.

"Order 651.

"Bought of Selby Smelting and Lead Co.

"Office: 416 Montgomery street.
"Smelting works and cartridge factory at Vallejo Junction.
"Shot tower at First and Howard streets.

"From shot tower.

"Shipped.	Marked.	Delivered. lbs.		
"2 pcs. 12-lb. sheet lead, 4′ 0″ x 8′ 2″	.....	791		
"2 pcs. 12-lb. sheet lead, 3′ 6″ x 12′ 4″	.....	1,060		
"2 pcs. 12-lb. sheet lead, 3′ 9″ x 15′ 0″	.....	1,328		
13				
"1 pc. 12-lb. sheet lead, 5′ 9″ x 15′ 0″	.....	1,027		
"2 pcs. 12-lb. sheet lead, 8′ 2″ x 4′ 0″	.....	791		
		4,997	7½c....	$344.77
"1 reel 2-lb. AA lead pipe, 50 feet	.....	463		
"2 reels 1-lb. AAA lead pipe, 120 feet each	...	1,448		
		1,911	7c.....	133.77
				$508.54
"Less 2c. for cash.....	.....	...		10.17
				$498.37

"Received March 15, 1900.

"I. G. MESSER, *Storekeeper.*

"Paid March 26, 1900.

"SELBY SMELTING AND LEAD CO.,
"Per H. B. UNDERHILL, JR., *Secretary.*

"Correct.

"FRANK A. LEACH,
"*Superintendent.*"

Your petitioner avers that neither the first nor the fourth count set forth in the said indictment, charges any crime or public offense against the United States, nor the violation of any law of the United States making or prescribing the matter set forth in either of the said counts, a crime or public offense, nor the violation of any law of the United States prescribing or permitting imprisonment for or because of the matters set forth in said counts or in either of
14 said counts one and four of said indictment.

Your petitioner further avers that the said judgment to the extent that it requires his imprisonment in the penitentiary of the State of California is void in this: that the said United States district court in and for the northern district of California, sentenced the said Walter N. Dimmick for one year and no more upon each of the two counts of the indictment referred to in said judgment; and did not sentence the said Walter N. Dimmick to said imprisonment for a period of more than one year upon each of said counts.

That your petitioner is deprived of his liberty without due process of law, in violation of article V of the amendments to the Constitution of the United States.

Wherefore your petitioner prays that the writ of *habeas corpus* be granted herein; that the same be directed to the said warden of the State prison at San Quentin, and returnable at a time and place designated. That upon the hearing, your petitioner be adjudged entitled to his liberty and ordered discharged from said imprisonment. And your petitioner will ever pray, etc.

WALTER N. DIMMICK, *Petitioner.*

GEORGE D. COLLINS,
Attorney for Petitioner.

15 UNITED STATES OF AMERICA, }
Northern District of California, } *ss:*

Walter N. Dimmick being duly sworn deposes and says that he is the petitioner herein; that he has read the foregoing petition and complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information or belief; that as to those matters he believes it to be true.

WALTER N. DIMMICK.

Subscribed and sworn to before me this 17th day of October A. D. 1903.

[SEAL.] A. DRAHMS,
Notary Public in and for the County of Marin, State of California.

(Endorsed:) No. 13493. In the circuit court of the United States, ninth judicial circuit, northern district of California. In the matter of the petition and complaint of Walter N. Dimmick, for the writ of *habeas corpus*. Petition and complaint for a writ of *habeas corpus*. Filed October 19, 1903, Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

16 At a stated term, to wit: the July term, A. D. 1903, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Monday, the 19th day of October in the year of our Lord one thousand nine hundred and three.

Present: The Honorable William W. Morrow, circuit judge.

In the Matter of the Petition and Complaint of WALTER N. DIMMICK for the Writ of *Habeas Corpus*. No. 13493.

Order Denying Writ of Habeas Corpus and Allowing Appeal, etc.

Comes now George D. Collins, Esq., attorney for Walter N. Dimmick petitioner herein, and presents to the court a petition of the said Walter N. Dimmick for the writ of *habeas corpus;* and the same having been considered by the court, it is ordered that the writ of *habeas corpus* prayed in and by the petition of said Walter N. Dimmick herein be and hereby is denied and that said petition be and hereby is dismissed.

Thereupon the said attorney for petitioner presented to the court and filed the appeal of said Walter N. Dimmick and moved the court for an order allowing an appeal herein to the Supreme Court of the United States from the foregoing order denying application for writ of *habeas corpus*, said appeal so filed being accompanied by an assignment of errors to be urged by the said Walter N. Dimmick, in the Supreme Court of the United States. Whereupon, it is ordered that said appeal be and hereby is allowed; that the amount of the bond for costs upon said appeal to be executed and
17 filed by said Walter N. Dimmick, be and hereby is fixed at the sum of $500.; that upon the filing and approval of such bond, citation issue in form as prescribed by law, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the Supreme Court of the United States.

18 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the Matter of the Petition and Complaint of WALTER N. DIMMICK for the Writ of *Habeas Corpus*.

Appeal.

In the above entitled matter the therein named Walter N. Dimmick conceiving himself aggrieved by the order and judgment of the United States circuit court for the ninth judicial circuit, northern district of California, entered on the 19th day of October A. D. 1903, in the said matter denying the petition and complaint therein filed for the writ of *habeas corpus* and denying the writ of *habeas corpus* therein, does hereby and in open court appeal from the said order and judgment to the Supreme Court of the United States and pray that this appeal be allowed in accordance with law and that the transcript of the record and proceedings and papers upon which said order and judgment were made, duly authenticated, be sent to the Supreme Court of the United States upon this appeal.

GEORGE D. COLLINS,
Attorney for the said Walter N. Dimmick.

San Francisco, October 19th, A. D. 1903.

(Endorsed:) No. 13493. In the circuit court of the United States ninth judicial circuit northern district of California. In the matter of the petition and complaint of Walter N. Dimmick for the writ of *habeas corpus*. Appeal. Filed October 19, 1903, Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

19 In the Supreme Court of the United States of America.

WALTER N. DIMMICK, Appellant,
vs.
JOHN W. TOMPKINS, the Warden of the State Prison of California, Appellee.

Assignment of Errors.

Of October term, in the year of our Lord one thousand nine hundred and three.

Afterwards to wit, on the 19th day of October, A. D. 1903, in the same term, before the justices of the Supreme Court of the United States of America, comes the said Walter N. Dimmick by Mr. George

D. Collins his counsel, and says that in the record and proceedings herein there is manifest error in this, to wit:

1. That the United States circuit court for the ninth circuit, northern district of California, committed manifest error in deciding that the term of imprisonment of the said Walter N. Dimmick has not expired.

2. That the said United States circuit court for the ninth circuit, northern district of California, committed manifest error in deciding that the said appellant is not entitled to the issuance of the writ of *habeas corpus*, upon the showing made in the petition therefor.

3. That the United States circuit court for the ninth circuit, northern district of California, committed manifest error in denying the petition for the writ of *habeas corpus* and in denying the said writ of *habeas corpus*.

4. That the said United States circuit court for the ninth circuit, northern district of California, committed manifest error in deciding that it was lawful for the district court of the United States in and for the northern district of California to sentence the said Walter N. Dimmick to an imprisonment in the penitentiary of the State of California, at San Quentin in said State, the fact being, as appearing from the said petition for the writ of *habeas corpus*, that the said imprisonment does not exceed the period of one year on each count of the indictment upon which the said Walter N. Dimmick was convicted and sentenced in the said United States district court.

5. That the United States circuit court for the ninth circuit, northern district of California, committed manifest error in deciding that the said Walter N. Dimmick is not deprived of his liberty without due process of law, in contravention of article V of the amendments to the Constitution of the United States.

6. That the United States circuit court for the ninth circuit, northern district of California, committed manifest error in deciding that the first count in the indictment set forth in the petition for the writ of *habeas corpus*, charges or states facts constituting a crime or public offense against the United States or that the matters set out in said first count, constitute a violation of a law of the United States, prescribing punishment by imprisonment.

7. That the United States circuit court for the ninth circuit, northern district of California, committed manifest error in deciding that the fourth count in the indictment set forth in the petition for the writ of *habeas corpus*, charges or states facts constituting a crime or public offense against the United States or that the matters set out in said fourth count constitute a violation of a law of the United States prescribing punishment by imprisonment.

8. That the United States circuit court for the ninth circuit, northern district of California, committed manifest error in deciding that the judgment set forth in said petition is not void and that the same does not deprive the said Walter N. Dimmick of his liberty

without due process of law, in violation of article V of the amendments to the Constitution of the United States.

9. That the said Walter N. Dimmick is deprived of his liberty without due process of law, and in contravention of the Constitution and laws of the United States.

Wherefore the said Walter N. Dimmick prays that the said order and judgment of the United States circuit court for the ninth circuit, northern district of California, be reversed, annulled and altogether held for nought, and that the said Walter N. Dimmick be restored to all things which he hath lost by reason of the said judgment; and that an order be made directing the discharge from imprisonment of the said Walter N. Dimmick.

GEORGE D. COLLINS,
Attorney for Appellant, Walter N. Dimmick.

(Endorsed:) No. 13493. In the Supreme Court of the United States. Walter N. Dimmick, appellant *vs.* John W. Tompkins, the warden of the State prison of California, appellee. Assignment of errors. Filed October 19, 1903, Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

22 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

WALTER N. DIMMICK, Appellant,
vs.
JOHN W. TOMPKINS, Warden, etc., Appellee.

Bond on Appeal.

Know all men by these presents, that we Morris Levy and Geo. D. Collins, both of the city and county of San Francisco, State of California, are held and firmly bound unto the above mentioned John W. Tompkins in the sum of five hundred dollars to be paid to the said John W. Tompkins for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated the 19th day of October A. D. 1903.

Whereas the above named Walter N. Dimmick has prosecuted an appeal to the Supreme Court of the United States to reverse the order and judgment rendered in the matter of the petition and complaint of the said Walter N. Dimmick for the writ of *habeas corpus* in the said circuit court of the United States for the northern district of California, now therefore the condition of this obligation is such that if the above named Walter N. Dimmick shall prosecute the said appeal to effect and answer all damages and costs if he fail

to make said appeal good, then this obligation shall be void,
23 otherwise the same shall be and remain in full force and virtue.

MORRIS LEVY. [SEAL.]
GEO. D. COLLINS. [SEAL.]

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, } ss:

Morris Levy and Geo. D. Collins being duly sworn each for himself deposes and says that he is one of the sureties on the foregoing bond; that he is worth the sum of five hundred dollars over and above all his debts and liabilities exclusive of property exempt from execution. That he is a resident of the city and county of San Francisco.

MORRIS LEVY.
GEO. D. COLLINS.

Subscribed and sworn to before me this 19th day of October, A. D. 1903.

[SEAL.] JULIUS CALMANN,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond is approved.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) No. 13493. In the United States circuit court ninth judicial circuit, northern district of California. In the matter of the petition and complaint of Walter N. Dimmick for a writ of *habeas corpus.* Bond on appeal. Filed Oct. 20, 1903 Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

24 *Præcipe.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California.

In the Matter of the Petition of WALTER N. DIMMICK for the Writ of *Habeas Corpus.*

To the clerk of the said court.

SIR: Please prepare and transmit to the United States Supreme Court, as the record on appeal in the above entitled matter, a certified transcript of the following record and proceedings, viz:

1. The petition for the writ of *habeas corpus*, with the endorsements thereon.
2. The motion for the writ of *habeas corpus* and order denying same as appear in the minutes of said court.
3. The appeal and order allowing same, and original assignment of errors.
4. The original citation on appeal and service of same.
5. A certificate to the foregoing record and a statement in the certificate that a bond for costs on the appeal, in the penal sum of $500 and approved by the Hon. W. W. Morrow, the judge of said court, has been filed as required by the order allowing the appeal.
6. *Præcipe* for transcript on appeal.

Respectfully,

GEO. D. COLLINS,
Attorney for Appellant.

(Endorsed:) No. 13493. In the United States circuit court ninth judicial circuit, northern district of California. In the matter of the petition and complaint of Walter N. Dimmick for a writ of *habeas corpus*. *Præcipe*. Filed Oct. 20, 1903, Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

25 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the Matter of the Petition and Complaint of WALTER N. DIMMICK for the Writ of *Habeas Corpus*. No. 13493.

Certificate to Record on Appeal.

I, Southard Hoffman, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing pages, numbered from 1 to 24, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled cause, and that the same constitute the transcript of the record herein upon appeal to the Supreme Court of the United States.

I further certify that the cost of the foregoing transcript of record is $15.40, and that said amount was paid by George D. Collins, attorney for Walter N. Dimmick; and that the original citation issued herein is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, this 28th day of October A. D. 1903.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN.
Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

26 *Citation on Appeal.*

UNITED STATES OF AMERICA, }
Northern District of California, } ss:

The President of the United States of America to John W. Tompkins, warden of the State prison of the State of California at San Quentin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, in the District of Columbia on the 30th day of November A. D. 1903, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, ninth judicial circuit, northern district of California, wherein Walter N. Dimmick is the appellant and you, the said John W. Tompkins are the respondent, to show cause if any there be, why the judgment of the said circuit court of the United States, in the matter of the petition and complaint of Walter N. Dimmick for the writ of *habeas corpus* mentioned in the said appeal, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 19th day of October in the year of our Lord one thousand nine hundred and three.

WM. W. MORROW,
Circuit Judge.

Service of the foregoing citation and receipt of a copy thereof, on this 20th day of October A. D. 1903 is hereby acknowledged.

MARSHALL B. WOODWORTH,
United States Attorney, Representing Appellee.

27 [Endorsed:] In the United States circuit court, ninth judicial circuit, northern district of California. In the matter of the petition and complaint of Walter N. Dimmick for a writ of *habeas corpus.* Citation on appeal and admission of service Filed Oct. 20, 1903, Southard Hoffman, clerk, by W. B. Beaizley deputy clerk. George D. Collins, 21–22 Crocker bldg., San Francisco, Cal., attorney for petitioner.

Endorsed on cover: File No. 19,179. N. California C. C. U. S. Term No. 528. Walter N. Dimmick, appellant, *vs.* John W. Tompkins, warden of the State prison of the State of California at San Quentin. Filed December 31", 1903. File No. 19,179.

3265?
Office Supreme Court U.
FILED
APR 20 1904
JAMES H. McKENNEY,
Clerk

No. 528.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1903.

WALTER N. DIMMICK,
Appellant,

vs.

JOHN W. TOMPKINS, the Warden of the State Prison of California,
Appellee.

MOTION TO ADVANCE.

GEORGE D. COLLINS,
Attorney for Walter N. Dimmick, the Appellant.

Pernau Press, S. F.

32633

No. 528.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1903.

WALTER N. DIMMICK,
Appellant,

vs.

JOHN W. TOMPKINS, the Warden of the State Prison of California,
Appellee.

MOTION TO ADVANCE.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States, and to the Court:

Comes now Walter N. Dimmick, the appellant, and makes this his motion that the above entitled cause be advanced upon the calendar of your Honorable Court, for hearing and determination. That the appeal herein is taken from a judgment of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, refusing and denying to the appellant, the writ

of habeas corpus in a case where the imprisonment is under color of federal authority and in violation of the Fifth Amendment. That the imprisonment is upon a certain judgment of the District Court of the United States, Northern District of California, whereby the said appellant was sentenced to imprisonment in the penitentiary of the State of California for the period of two years from the 16th day of October, A. D. 1901. That said imprisonment has expired but appellant is still deprived of his liberty and is still imprisoned in said penitentiary under pretense of said judgment, the said Circuit Court deciding that inasmuch as this appellant was not delivered to the penitentiary until April 13, A. D. 1903, the said sentence does not commence to run until that date, notwithstanding the terms of the said judgment that the said sentence of two years shall date and commence from the said 16th day of October, A. D. 1901. That unless said appeal is advanced to an early hearing, the said question and also the other questions presented in the appellant's brief, now on file herein, will become moot questions, for in any event appellant's term of imprisonment, even under the construction placed by the said Circuit Court upon the said judgment of the District Court, will expire on the 13th day of December, A. D. 1904, there being a deduction of two months in each year for good behavior. That the following are the questions raised and presented by appellant, on the said appeal, viz.:

1. Did the sentence of appellant to the penitentiary, expire on the 16th day of October, A. D. 1903, in any event?

2. If not, did the fact that on the 16th day of October, A. D. 1901, the appellant was imprisoned in the County Jail, and under the said judgment and continued a prisoner in the County Jail and under said judgment until the 13th day of April, A. D. 1903, when he was delivered over to the warden of the penitentiary and there imprisoned ever since, constitute on the 16th day of October, A. D. 1903, a *satisfaction* of the sentence of two years, the case being one of misdemeanor and not felony?

3. Is the sentence void *ab initio,* in view of the fact that therein the appellant is ordered imprisoned in the penitentiary for one year for each separate offense, the law prohibiting a sentence to the penitentiary where for any one offense, the imprisonment does not exceed one year?

4. Is the conviction and sentence of appellant, for an offense that is made a crime by any law of the United States?

5. Is the appellant deprived of his liberty without due process of law, in violation of the Fifth Amendment?

If these questions are not determined by your Honorable Court prior to the 13th day of December, A. D. 1904, they cannot be determined at all, as they then become entirely moot questions.

Wherefore the appellant, Walter N. Dimmick, prays that the said appeal be advanced upon the calendar of your Honorable Court, to an early hearing.

GEORGE D. COLLINS,
Attorney for Walter N. Dimmick, the Appellant.

Notice is hereby given you that on Monday, the 25th day of April, A. D. 1904, at the opening of the court on that day, the appellant, Walter N. Dimmick, will present to the Supreme Court of the United States, the foregoing motion. The said motion will be made upon the record and the papers on file in the cause, and on the grounds in said motion set forth.

Respectfully,

GEORGE D. COLLINS,

Attorney for Walter N. Dimmick, the Appellant.

To the appellee, John W. Tompkins, and to the Attorney General of the United States.

FILED
APR 20 1904
JAMES H. McKENNEY, Clerk.

No. 528.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1903.

WALTER N. DIMMICK,

Appellant,

vs.

JOHN W. TOMPKINS, the Warden of the State Prison of California,

Appellee.

APPELLANT'S BRIEF.

GEORGE D. COLLINS,

Attorney for Walter N. Dimmick, the Appellant.

Pernau Press, S. F.

32656

No. 528.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1903.

WALTER N. DIMMICK,
Appellant,

vs.

JOHN W. TOMPKINS, the Warden of the State Prison of California,
Appellee.

APPELLANT'S BRIEF.

This is an appeal from the judgment and order of the United States Circuit Court, Northern District of California, denying and refusing to the appellant, Walter N. Dimmick, the writ of *habeas corpus*..

It appears from the petition and complaint that the appellant is unlawfully imprisoned by the respondent, John W. Tompkins, the warden of the State Prison of California, at San Quentin; that the imprisonment is in contravention of the Fifth Amendment to the Constitution in that the appellant is deprived of his liberty under pretense of Federal authority and without due

process or any process of law; that on *October 16th, A. D. 1901*, the prisoner was sentenced by the United States District Court, Northern District of California, upon conviction of alleged crime; to wit: Upon a verdict of guilty on the first and fourth counts of the indictment, and for what is alleged to be a violation of sections 5438 and 5497 of the Revised Statutes of the United States; that the sentence and judgment of the District Court directs the imprisonment of the appellant for the term of "*two "years, from October 16th, A. D. 1901.*" The petition and complaint for the writ of *habeas corpus* further shows that immediately upon the pronouncing of the said judgment the petitioner was imprisoned by order of the District Court and "under said judgment" in the County Jail of the County of Alameda; and was thus imprisoned until the 13th day of April, A. D. 1903, when he was removed to the State Prison at San Quentin, to serve his sentence, or, more accurately speaking, to serve the remaining portion of his sentence; that his said sentence expired on the 21st day of September, A. D. 1903, as the result of the credits earned by him for good behavior; *that in any event, the sentence by its very terms and by its own limitation, expired on the 16th day of October, A. D. 1903.* The application for the writ of *habeas corpus* was filed in the Circuit Court of the United States, on the 19th day of October, A. D. 1903, and was sworn to on the 17th day of October, A. D. 1903; the intervening day was Sunday. The petition and complaint set forth in *haec verba*, the judgment of the District Court and the verdict and indictment. The application for the writ was presented in open court and the court denied it; but

allowed an appeal to the United States Supreme Court. The appeal was thereupon duly perfected. No opinion was rendered by the Circuit Court.

II.

ERRORS ASSIGNED.

The judgment and order appealed from are erroneous in the following particulars as set forth in the assignment of errors, viz:

1. That the United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that the term of imprisonment of the said Walter N. Dimmick had not expired.

2. That the said United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that the said appellant is not entitled to the issuance of the writ of *habeas corpus*, upon the showing made in the petition therefor.

3. That the United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in denying the petition for the writ of *habeas corpus* and in denying the said writ of *habeas corpus*.

4. That the said United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that it was lawful for the District Court of the United States, Northern District of California, to sentence the said Walter N. Dimmick to an imprisonment in the penitentiary of the State of Cali-

fornia, at San Quentin in said state, the fact being, as appearing from the said petition for the writ of *habeas corpus,* that the said imprisonment does not exceed the period of one year on each count of the indictment upon which the said Walter N. Dimmick was convicted and sentenced in the said United States District Court.

5. That the United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that the said Walter N. Dimmick is not deprived of his liberty without due process of law, in contravention of Article V of the Amendments to the Constitution of the United States.

6. That the United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that the first count in the indictment set forth in the petition for the writ of *habeas corpus,* charges or states facts constituting a crime or public offense against the United States, or that the matters set out in said first count constitute a violation of a law of the United States, prescribing punishment by imprisonment.

7. That the United States Circuit Court for the Ninth Circuit. Northern District of California, committed manifest error in deciding that the fourth count in the indictment set forth in the petition for the writ of *habeas corpus,* charges or states facts constituting a crime or public offense against the United States or that the matters set out in said fourth count constitute a violation of a law of the United States prescribing punishment by imprisonment.

8. That the United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that the judgment set forth in said petition is not void and that the same does not deprive the said Walter N. Dimmick of his liberty without due process of law, in violation of Article V of the Amendments to the Constitution of the United States.

9. That the said Walter N. Dimmick is deprived of his liberty without due process of law, and in contravention of the Constitution and laws of the United States.

Each of these errors is supported by the petition and complaint for the writ of *habeas corpus*. As already stated, the Circuit Court refused to issue the writ, holding that the matters set forth in the petition were insufficient in law to sustain the application.

BRIEF OF ARGUMENT.

I.

The first point we urge in support of our prayer for *reversal* of the judgment and order of the Circuit Court denying the application for *habeas corpus* is this: By the express terms of the judgment of the District Court the term of appellant's imprisonment is two years, from *October 16th, 1901*—"It is therefore ordered, ad-" judged and decreed that the said Walter N. Dimmick " be and he is hereby sentenced to be imprisoned at " hard labor for the term of two years, from October " 16th, 1901; and it is further ordered that said sentence

"of imprisonment be executed upon the said Walter N. "Dimmick by imprisonment in the State Prison of the "State of California, at San Quentin, Marin County, "California.

"JOHN J. DEHAVEN,
"United States District Judge,
"Northern District of California."

It is a mere matter of arithmetic that the sentence expired by its own limitation on the 16th day of October, 1903, assuming there was no deduction for credits earned by good behavior. It surely is competent for a court to fix the date of the commencement of the term of sentence (Ex Parte Gibson, 31 Cal. 627; Woodward vs. Murdock, 124 Ind. 439; State vs. Gaskins, 65 N. C. 320; Kelly vs. State, 3 Sm. & Mar. 518); and of course when fixed, it becomes an essential part of the judgment; and cannot be ignored nor rejected; to do so, would be to render a new and entirely different judgment—one not pronounced by the trial court. There are two separate and distinct parts to the judgment; one part fixes the term of the sentence; the other fixes the place of imprisonment. The point now presented relates only to the term of the sentence and has nothing to do with the place of imprisonment. So far as we are advised, the authorities are all one way on the proposition, and hold that the *term* of sentence runs from the date fixed in the judgment for its commencement, irrespective of the actual imprisonment or of its duration; this of course upon the theory that the sentence *as prescribed,* is the warrant in the hands of the prison keeper, and that he being merely a ministerial offi-

cer, cannot look beyond the express terms of the sentence, that the sentence is the measure of his authority to imprison; and that therefore he must obey its mandate and cannot reject nor eliminate any part of it; to permit him the power to say that the sentence does not run from the date which it expressly prescribes as the commencement of the term of sentence, and to substitute the date of the commencement of the actual imprisonment, as the beginning of the term of sentence, is clearly to give him authority to change the judgment of the court; and its logical effect is to give him the right to imprison without due or any *process* of law whatever. Instead of the term of sentence being matter of record as the law requires it to be, it would become entirely matter *in pais*. Clearly, no imprisonment can be had in contradiction of the judgment. The term of a sentence to imprisonment is not at all synonymous with the duration of the actual imprisonment; the latter can never lawfully exceed the term of the sentence; the term of the sentence is to be ascertained from the language used in designating the length of the term, and its commencement; the actual imprisonment is always subordinate to the term prescribed in the sentence; and of course, reference can only be had to the language of the sentence; the requirements of the *sentence* as to commencement and duration must always control irrespective of the length of the actual imprisonment; to permit an imprisonment after the expiration of the time designated in the *sentence*, is necessarily to authorize or permit an imprisonment without due or any process of law; a process that has *expired* by its own limitation, can never be made the basis for nor

constitute due or any process whatever. We insist on the self-evident distinction between the term of the sentence; and the term of actual imprisonment. The sentence is one thing; its satisfaction is quite another and essentially different thing. The sentence as expressed in the judgment is alone the only lawful authority and warrant for the imprisonment; the latter must, in all cases, be within the limitation as fixed in the sentence. The imprisonment must always conform to the term as fixed in the sentence; otherwise there is no written warrant for the imprisonment. Suppose the sentence expressly states, as does the sentence in this case, that the term of imprisonment shall expire two years from the 16th day of October, 1901, would an imprisonment occurring subsequently to October 16, 1903, be warranted or authorized by the *sentence?* Certainly not; it is a palpable fallacy to suggest that the sentence in this case has not been *satisfied* and cannot be satisfied by imprisonment in the penitentiary for the six months actually served by the prisoner in that institution. The question is not, what constitutes a *satisfaction* of the sentence; but whether the sentence has expired by its own limitation as to its duration. If it has expired, then there is no longer any basis for due or any process of law to authorize imprisonment, and the imprisonment must necessarily be in violation of the Fifth Amendment. The sentence is not that the appellant be imprisoned in the penitentiary for two years; but that he be imprisoned for the term of two years from *October 16, 1901;* a sentence of that character may as a matter of law, become impossible of execution by the lapse of time without imprisonment at all. It is conceivable that the

term of the sentence may well expire before the actual imprisonment even begins. The Supreme Court of Illinois recognized the correctness of that very obvious proposition in the case of

Johnson vs. People, 83 Ill. 431, 437.

We quote the following from the opinion in that case, viz:

"But the court below erred in the judgment it rendered on the verdict in this case. It fixed the day and hour when the imprisonment should commence under each count upon which plaintiff in error was found guilty. Since a *supersedeas* was granted in this case, *it has become impossible that the judgment of imprisonment can be carried into effect, as the time fixed by the court has elapsed and expired* (italics ours). Other contingencies might arise which would render it impracticable to carry such a judgment into effect. The sentence to imprisonment should be for a specified number of days under each count upon which a conviction is had, and the judgment should require that the imprisonment under each succeeding count should commence where it ends under the preceding count, without fixing the day or hour for each or either to commence or end. For this error the judgment of the court below must be reversed and the cause remanded with directions thatt the court enter a proper judgment on the verdict."

Johnson vs. People, 83 Ill. 431, 437.

The judgment however cannot be changed after it is partially executed by imprisonment for a portion of the time prescribed.

Ex Parte Lange, 18 Wall. 163, 173, 176.

And in a case before the Supreme Court of Indiana, it is very forcibly said by the court:

" It was only by virtue of the judgment of the Marion " Criminal Court that the appellant was held as a pris- " oner; it by its very terms only condemned him for five " years from its date, less any time for which under the " law he might be entitled to credit. The law allowing " him credit for good time entered into the judgment as " if written therein, and therefore, by the very language " of the judgment, the appellant's term expired on De- " cember 13, 1889. It is only by virtue of the judgment of " a court of competent jurisdiction that a citizen can " be condemned to imprisonment, and when the time ex- " pires for which the sentence runs, as given in the judg- " ment, the prisoner is entitled to his discharge. This is " not a new question in this court. See Flora vs. Sacha, " 64 Ind. 155."

Woodward vs. Murdock, 124 Ind. 439.

Says Bishop:

" The day on which a prisoner is sentenced will be reck- " oned as a part of his term of imprisonment."

Bishop on Stat. Crimes, sec. 218;
Com vs. Keniston, 5 Pick. 420.

The question really needs no citation of authority. It is quite elementary that the terms of the judgment are the absolute and exclusive measure and limitation of the sentence. Therefore it is only necessary to ascertain the contents of the judgment to determine the limitation of the imprisonment. The authority of the prison-keeper is restrained and defined by the terms in which the sentence is expressed in the judgment; any other view would dispense with the necessity of a written judgment and with the necessity of process in execution of the judgment. Again we point out,—the question is not as to whether the sentence has been *satisfied;* but whether the term of the sentence as expressed in the judgment has expired by the very limitation placed upon it in the sentence itself; upon both principle and authority, the conclusion must be in the affirmative. The sentence is precisely the same as though the District Court had expressly stated in it, that the authority for the imprisonment *expires on the 16th day of October, 1903.*

II.

THE SENTENCE HAS BEEN FULLY SATISFIED.

The next point we urge is, that the sentence has been fully satisfied by the actual imprisonment of the appellant for the period of *two years.* This point of course has no relation whatever to the point last raised. The point we are now presenting, necessarily proceeds on the assumption that the sentence can only be *satisfied* by two years actual imprisonment. It appears from the petition

and complaint for *habeas corpus*, that on the very
the sentence was pronounced, to wit: on October 1
1901, the appellant was by the District Court and "un
"the judgment" that had been rendered against h
committed to the County Jail of Alameda County
that he there remained a prisoner until April 13th, 19
when he was removed to the State Prison at San Quen
where he has ever since been imprisoned. Now the
is, that where a person is sentenced to the penitentia
for an offense which is only a *misdemeanor*, the time
spends in the County Jail, subsequent to judgment m
be credited on the sentence even though its terms requ
incarceration in the penitentiary.

People vs. Lincoln, 62 How. Pr. 412;
Bishop on Stat. Crimes, sec. 218.

The reason for the rule is self-evident; in the punishm
of a *misdemeanor*, the character of the prison is of
consequence; in the punishment of felony, it is the ch
acter of the prison that makes it a felony; therefore, if
a conviction of a *misdemeanor* the sentence is to the pe
tentiary and the actual imprisonment is nevertheless i
County Jail, the time thus served in the County Jail
a satisfaction of the sentence either *pro tanto* or entir
according to the time served. When the State impris
a person convicted of a *misdemeanor*, no matter wh
the imprisonment is had, even though it be not the pri
designated in the judgment, the time thus served in
is to that extent a *satisfaction* of the sentence.

People vs. Lincoln, 62 How. Pr. 412;
In Re Jennings, 118 Fed. Rep. 481.

It is the fact of imprisonment rather than the place of imprisonment that *satisfies* a sentence for a misdemeanor. In legal effect, the order of the District Court made immediately after judgment, directing the appellant's imprisonment in the County Jail of Alameda County, was to that extent, a modification of the judgment as to the place of imprisonment.

But whether that is so or not, the law is well established that the time served by the appellant in the county jail of Alameda County, is a *pro tanto* satisfaction of the sentence, if the conviction was for a *misdemeanor* and not a felony. That the conviction of appellant for violating sections 5438 and 5497 of the Revised Statutes of the United States, is a conviction of a misdemeanor and not the conviction of a felony, we cite the following authorities as being directly in point:

Ex Parte Wilson, 114 U. S. 422;
Mackin vs. United States, 117 U. S. 350;
Bannon vs. United States, 156 U. S. 466, 477;
Regan vs. United States, 157 U. S. 303.

The law of the State of California prohibits the imprisonment in the penitentiary of persons convicted of a misdemeanor.

Ex Parte Ah Cha, 40 Cal. 426.

Under the Revised Statutes, the District Court has power to designate any prison of the State as the place of confinement; and of course may at any time modify its judgment in that respect, in misdemeanor cases.

III.

SENTENCE IS VOID.

The sentence is absolutely void for two reasons, viz:

1. It proceeds upon a conviction of two separate and distinct offenses, and the imprisonment for each offense *does not exceed one year;* therefore that part of the sentence which requires imprisonment in the penitentiary is absolutely void; being void, the appellant is deprived of his liberty without due process of law and in violation of the Fifth Amendment.

2. In the second place, the sentence is absolutely void for the further reason that the indictment in the first and fourth counts (they being the counts upon which the conviction was had), charges no crime known to the laws of the United States; in other words, the matters set forth in both the first and fourth counts, are not made criminal by any statute of the United States. Of these points in their order.

3. As to the first of these points, viz: That the sentence is void because it directs imprisonment in the penitentiary for a period that does not exceed one year on each count, we need only cite in support of our contention, the authority of the case of

Ex Parte Mills, 135 U. S. 270.

It was there decided that imprisonment in the penitentiary on a sentence that did not exceed one year *for any one offense,* is absolutely void and would be relieved

against on *habeas corpus*. There were, in that case, two indictments before the court; on one, the sentence was for a year; and on the other, for six months in the penitentiary; the sentences were made cumulative; the aggregate of the two sentences exceeded one year; but that feature of the case was held to make no difference; the validity of *each* sentence must be determined by itself; and the addition or aggregating of two void sentences could not make a valid sentence. It is true that in our case, there is only one indictment; but as a matter of law, that fact of itself, does not serve to differentiate. There are two counts upon both of which the appellant has been convicted and sentenced to the penitentiary. Each *count* is in law a separate indictment.

Selvester vs. United States, 170 U. S. 262, 266.

" Each count is in fact and theory a separate indict-
" ment."

Selvester vs. United States, 170 U. S. 267.

In our case there is one sentence for *two years upon two counts*. The conviction and sentence are for two separate and distinct offenses charged in the first and fourth counts respectively. As "each count is in fact and theory " a separate indictment", the case stands precisely as if the appellant had been convicted and sentenced to the penitentiary for the period of one year only, upon an indictment containing but one count; and had concurrently therewith been sentenced to the penitentiary by cumulative sentence for the further period of one year upon another indictment containing but one count. Now the fact

that the aggregate of these two sentences is two years, does not authorize imprisonment in the penitentiary. You cannot add two separate and distinct offenses with the term of imprisonment assigned to both collectively, and treat the sentence in the aggregate, and as being for one offense only. The very language of the statute governing the question (section 5541, Revised Statutes), prohibits a sentence to the penitentiary *for any one offense,* where the term of imprisonment does not exceed one year. Here there are *two separate* offenses for which sentence is given; and the aggregate sentence is two years. *It therefore does not exceed one year for each offense;* for that reason it is absolutely void to the extent that it requires imprisonment in the penitentiary. Under section 5541 of the Revised Statutes, no sentence is valid where the imprisonment is directed to be had in the penitentiary, unless the sentence for *each offense* exceeds the period of one year. Where, as here, there are *two* offenses upon which there is one sentence for the period of two years, it cannot possibly be a sentence exceeding one year for each offense; and it is therefore absolutely void according to the ruling in

Ex Parte Mills, 135 U. S. 270.

The sentence, as rendered, is an entirety. If void in part it is void *in toto.*

4. If a person is imprisoned for what is not a crime against the United States, he is entitled to his discharge on habeas corpus.

" If the commitment be against law, as being made by

" one who had no jurisdiction of the cause, or for a mat-
" ter for which by law no man ought to be punished, the
" court are to discharge." (Bac. Abr. Hab. Corp., 585.)

Say the Supreme Court:

" The latter part of this rule, when applied to impris-
" onment under conviction and sentence, is confined to
" cases of clear and manifest want of criminality in the
" matter charged, such as in effect to render the pro-
" ceedings void."

Ex Parte Siebold, 100 U. S. 376.

" Whenever a court undertakes to imprison for an
" offense to which no criminality is attached, it acts be-
" yond its jurisdiction."

Ex Parte Hollis, 55 Cal. 407.

" The court derives its jurisdiction from the law, and
" its jurisdiction extends to such matters as the law de-
" clares to be criminal, and none other, and when it un-
" dertakes to imprison for an offense to which no crimin-
" ality is attached it acts beyond its jurisdiction."

Ex Parte Corryell, 22 Cal. 181.

It is an absurdity to say that a court has jurisdiction to decide whether it possesses jurisdiction and that its decision in favor of itself vests in the court the jurisdiction which the law denies to it, so that its ruling is mere error and not usurpation.

Does either the first or the fourth count of the indictment against Mr. Dimmick charge him with an offense that is made a crime by any statute of the United States?

As to the first count, the record makes reference to section 5438 of the Revised Statutes in support of its averments. Certainly there is no other provision in the laws of the United States having the least application to the case presented by the first count. Therefore if section 5438 of the Revised Statutes does not sustain the first count, there is in that respect, presented by the record, a case "of clear and manifest want of criminality in the " matter charged such as in effect to render the proceed- " ings void". (Ex Parte Siebold, 100 U. S. 376.) It is charged in the first count that the prisoner presented for payment to one W. K. Cole, the cashier of the mint at San Francisco, a claim that once existed against the United States as a valid, subsisting and *bona fide* claim for materials actually purchased by the United States and actually furnished the United States at the price named in the claim. It is further charged that this claim had been paid by the United States in lawful recognition of an unquestioned liability and that at the time of such payment there was endorsed upon the face of it, by the creditor, a valid receipt of payment in full; that thereafter the prisoner presented this same identical claim to Cole, the cashier of the mint, for another payment; that when presented by the prisoner, the claim contained upon its face the receipt of payment in full. There is no charge that the prisoner made any representation or statement to Cole as an inducement to payment, and there is no averment that the prisoner obtained any money upon his presentation of the claim or otherwise, or that Cole paid out any of the money of the United States, on the claim. In other words, there is nothing whatever in the

first count, to indicate that the United States was defrauded, or to indicate that any attempt was made to defraud. The first count does, it is true, designate the claim to be "false, fictitious, and fraudulent"; but, these are mere epithets and conclusions of law, and signify nothing.

Van Weel vs. Winston, 115 U. S. 237, 238.

Especially are these designations of no importance when the indictment itself proceeds, and descending into particulars, establishes the fact by explicit averment that the claim is not and never was false, fictitious or fraudulent; but on the contrary, was at all times valid, genuine and *bona fide, in and of itself.*

According then, to the case made out in the first count, the prisoner is merely charged with presenting to one Cole, a cashier of the mint, for payment, a genuine, bona fide and valid claim that had been already paid by the United States, and at the very time bore upon its face a valid and genuine receipt of payment in full. That is all there is to the first count of the indictment. It would be strange indeed if such indifferent conduct as that charged in the first count, against the prisoner, is made criminal by the law of any civilized country. No fraud and no attempt at fraud is charged. Nothing but a mere idle presentation of a claim, valid and genuine, already paid, and showing on its face that it had been paid. In fact no fraud was possible, at least according to the averments of the first count. The necessarily idle and futile act of presenting the claim was not fitted or adapted or calculated to defraud or to injure the United

States. On a well settled principle of constitutional law, it does not reside within the power of the government to make criminal an act indifferent in itself and one that cannot injure or prejudice; and one that cannot affect the government or its affairs. There is an implied limitation on all governmental functions, that prohibits interference in matters that do not concern the State.

"The courts are not bound by mere forms, nor are they "to be misled by mere pretenses. They are at liberty, "indeed, they are under a solemn duty—to look at the "substance of things whenever the enter upon the "inquiry whether the legislature had transcended the "limits of its authority. If, therefore, a statute purport- "ing to have been enacted to protect the public health, the "public morals, or the public safety, has no real or sub- "stantial relation to those objects, or is a palpable in- "vasion of rights secured by the fundamental law, it is "the duty of the court to so adjudge, and thereby give "effect to the constitution."

Mugler vs. Kansas, 123 U. S. 661.

This was said of the police power of the States, but it is equally applicable to the "police power" of the nation. It certainly is no more competent for the nation than it is for the States to make criminal an act indifferent in itself and one that does not affect the public nor the government nor the affairs of the government. No man's liberty can be taken from him for the doing of an act indifferent in its nature and consequences, without violating the Constitution. Arbi-

trary power cannot constitutionally exist, in a republican form of government.

These general observations are pertinent only as indicating that Congress has no power to make criminal the matters charged in the first count of the indictment; nor has Congress attempted to do so. Section 5438 of the Revised Statutes, relied upon by the government to sustain the first count of the indictment, has absolutely no application at all to the case. The statute in terms is confined to claims that are "false, fictitious or fraudulent", and not claims that though paid, are genuine, valid and *bona fide*. The indictment in very restrictive language charges in the first count that the prisoner presented for payment, the valid, genuine and *bona fide* claim of the Selby Smelting and Lead Company; not that he made the claim the *basis* of another but false, fictitious and fraudulent claim; the latter is not the charge laid in the indictment. The first count proceeds upon the absolutely untenable and indefensible theory that the *Selby* claim, genuine, valid and *bona fide* as it was and as it is conceded to have been, up to the time of its payment, became thenceforth and by reason of its payment, a false, fictitious and fraudulent claim; that therefore when the prisoner presented *that* claim, after payment had been already made, he presented a false, fictitious and fraudulent claim. The question is not whether it was a *bona fide* and valid and subsisting claim in his hands, but whether it ever was a false, fraudulent or fictitious claim. Suppose that before the *Selby* claim was paid by the government, the prisoner presented it for payment, would anyone contend that

he was presenting a false, fictitious or fraudulent claim
Certainly not. Then how in reason or in law could th
claim thereafter become false, fictitious or fraudulen
merely because it had been paid? Conceding that a pai
claim is no longer a pending claim, it certainly is not in
trinsically a false, fraudulent or fictitious claim. Tru
it could not be the basis of another claim, and the latter
made upon the former would be false if not fraudulen
but in that case it would be essential, in order to bring th
matter within the statute, that the indictment charge th
presentation of the false claim and not charge as it doe
here, the presentation of the genuine claim that had bee
previously paid. A claim for payment of a valid, genuin
and *bona fide* claim already paid, is not such a claim as th
statute contemplates. The claim referred to in the sta
ute is not a claim or demand for *payment* of a clain
but, on the contrary, the claim presented for pay
ment is the claim that must be false, fictitious o
fraudulent, or the case is not within the statut
A claim of payment therefore is not the claim mentione
in the statute. It is the claim of which payment is de
manded, that the statute requires to be false, fraudule
or fictitious. The courts cannot extend the statute by co
struction. The statute has no application to a genuin
valid and *bona fide* claim that has been previously pai
The prisoner is only accused of presenting a claim of *th*
character; he is not charged with presenting a false, fict
tious or fraudulent claim. The charge is very specific tha
the claim he presented was the genuine and valid claim o
the Selby Smelting and Lead Company that had bee
previously paid. The statute requires that the claim *pr*

sented for payment be a false, fraudulent or fictitious claim; and certainly that charge cannot be predicated of the *Selby* claim. The statute can have sufficient scope and operation if it is confined to claims that have never been real or genuine; and it is the duty of the courts to give it that construction in favor of liberty.

United States vs. Hartwell, 6 Wall. 396.

"There can be no constructive offenses, and before a "man can be punished his case must be plainly and un- "mistakably within the statute."

United States vs. Lacher, 134 U. S. 628;
United States vs. Brewer, 139 U. S. 288.

"It is axiomatic that statutes creating and defining "crimes cannot be extended by intendment, and that no "act, however wrongful, can be punished under such a "statute unless clearly within its terms."

Todd vs. United States, 158 U. S. 282.

"The statute does not cover the transaction, and how- "ever reprehensible the acts of the plaintiffs in error may "be thought to be, we cannot sustain a conviction on that "ground. Although the objection is a narrow one, yet the "statute being highly penal, rendering the violator liable "to fine and imprisonment, we are compelled to construe "it strictly. Full effect is given to the statute by holding "that the language applies only to that kind of a paper "which depends upon a lottery, the drawing of which has "not yet taken place, and which paper purports to be a

" certificate, etc., as described in the act. If it be urged " that the act of these plaintiffs in error is within the " reason of the statute, the answer must be that it is so " far outside of its language that to include it within the " statute would be to legislate and not to construe legis- " lation."

France vs. United States, 164 U. S. 676, 682.

The cases are strictly analogous and the decision is directly in point.

We specially direct attention to the fact that the claim charged in the first count to have been presented for payment by the prisoner, is there stated to be the claim annexed as "Exhibit A". On an inspection of that claim it is seen to be the claim, the genuine and valid though paid and satisfied claim of the Selby Smelting and Lead Company. The averment is matter of essential description; the indictment identifies the claim presented as being that of the Selby Smelting and Lead Company. Surely *that claim* was never false, fictitious or fraudulent. The act of presenting it for a second payment may have been fraudulent, but that fact did not make the claim fraudulent, nor false nor fictitious. The statute is not at all directed against the fraudulent presentation of claims for payment but is confined to the presentation of false, fraudulent or fictitious claims,—an altogether different matter. The point is, that the *Selby* claim never having *itself* been a false, fictitious or a fraudulent claim against the United States, is not within the provisions of section 5438 of the Revised Statutes, and therefore the presenta-

tion of *that* claim for payment, is not made a crime by any law of the United States. It must be borne in mind in this connection, and it is self-evident, that in determining whether a claim is within the statute, the act of presenting it for payment cannot be considered. The statute requires that the claim itself be false, fraudulent or fictitious, independently of and without reference to its being presented for payment; otherwise it cannot be said that a false, fraudulent or fictitious claim was presented or made. No matter how fraudulent may be the act of presenting the claim, if it is not a false, fraudulent or fictitious claim it is not within the statute. It is charged in the first count that the prisoner not only presented the valid and genuine *Selby* claim for payment but that he also made the claim; the latter feature of the charge is an absurdity on the face of it. The prisoner could not *make* the Selby claim, when it is expressly alleged in the first count that the claim is both valid and genuine. It must be a sort of constructive making that the pleader referred to; but even if the prisoner did *make* the Selby claim as charged, it was never a false, fraudulent or fictitious claim; and therefore is not within the statute.

It is undoubtedly the case that the Selby claim would not be a true or genuine or valid claim in the hands of the prisoner; but it does not follow that the Selby claim would therefore be false, fraudulent or fictitious. Besides the prisoner is not charged with putting forth any claim of his own. It is important to the rights of the prisoner that we emphasize and lay special stress upon the proposition that the claim and the only claim the prisoner is

accused of presenting for payment, is the *Selby* claim which has never been false, fictitious or fraudulent. If it were the fact that the prisoner made or presented a claim of his own, that was false, fictitious or fraudulent, it of course was essential that it be so charged in the indictment. The sixth amendment of the Constitution in terms confers on the prisoner the right "to be informed of the " nature and cause of the accusation". We insist that the offense charged in the first count is not made a crime by any statute of the United States.

4. The fourth count of the indictment also fails to charge any offense that is made a crime by any law of the United States. Section 5497 of the Revised Statutes, is relied upon by the prosecution as being the statute making criminal the matters charged in the fourth count. This contention of the prosecution is manifestly untenable. Section 5497 of the Revised Statutes applies only to " every banker, broker, or other person, and to every " president, cashier, teller, director, or other officer of " any bank or banking association". This statute was amended by Act of February 3, 1879, chap. 42, and by the amendment extended to officers and their assistants in the internal revenue service (20 Stat. 280), thus indicating that the words "or other person" as used in the main section, only relate to persons of the same general class as *bankers and brokers.* "If all persons were meant, there was no " need of the specific enumeration."

Bishop on Stat. Crimes (3d Ed.), sec. 245;
Sutherland on Stat. Constr., sec. 272.

The fourth count charges that the prisoner was a *clerk* in the mint of the United States; he therefore is not within the provisions of section 5497 of the Revised Statutes.

We respectfully submit that the Circuit Court committed manifest error in refusing and denying the appellant, the writ of *habeas corpus*, and therefore the judgment appealed from should be *reversed* as prayed for.

George D. Collins

GEORGE D. COLLINS,

Attorney for Walter N. Dimmick, the Appellant.

FILE COPY

Supreme Court U.S.
FILED
MAY 15 1904
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

WALTER N. DIMMICK, APPELLANT,
v.
JOHN W. TOMPKINS, WARDEN OF THE STATE PRISON of the State of California at San Quentin. } No. 528.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEE.

32671

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

WALTER N. DIMMICK, APPELLANT,
v.
JOHN W. TOMPKINS, WARDEN OF THE State Prison of the State of California at San Quentin. } No. 528.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEE.

This case was decided by the circuit court upon the petition alone, neither the writ prayed nor a rule to show cause being issued, and therefore no return made. In denying the petition, the circuit court rendered no opinion.

The petition shows on its face that Dimmick has not served his sentence.

The judgment and sentence of the district court was as follows (record, 2–3):

> That whereas the said Walter N. Dimmick having been duly convicted in this court of making and presenting [a] false claim, as charged in the first count of the indictment, and using a

portion of public moneys of the United States, to wit, the sum of $498.37, for a purpose not prescribed by law, as charged in the fourth count of the indictment:

It is therefore ordered, adjudged, and decreed that the said Walter N. Dimmick be, and he is hereby, sentenced to be imprisoned at hard labor for the term of two years from October 16, 1901; and it [is] further ordered that said sentence of imprisonment be executed upon the said Walter N. Dimmick by imprisonment in the State prison of the State of California, at San Quentin, Marin County, California.

The petition, filed October 19, 1903, states that "the said Walter N. Dimmick has been imprisoned under said judgment in the State prison ever since the 13th day of April, A. D. 1903," thus clearly showing that his time—two years—has not expired.

The allegation that prior to April 13, 1903, and from the date of the sentence, October 16, 1901, Dimmick was confined in the *county jail* "under said judgment" is inconsistent with the judgment, which was for imprisonment in the State prison.

The material part of the sentence was that Dimmick be imprisoned for *two years* at hard labor in the *State prison.*

The *time* from which the sentence was to commence was directory merely.

Ex parte Bell, 56 Miss., 282.
Ex parte Duckett, 15 S. C., 210.

The general rule is that the time when the imprisonment is to begin or end need not be and, according to the better practice, is not specified in the sentence, it being sufficient to state its duration merely.

> Bish. New Crim. Proced., sec. 1310, par. 3.
> 25 A. & E. Ency. Law (2d ed.), p. 303, and cases cited in note.

The rule as to the *place* of imprisonment is different. According to the prevailing practice, when the sentence is imprisonment the place of imprisonment should be specified.

> 25 A. & E. Ency. Law (2d ed.), p. 302, and cases in note.

The nature of the punishment—whether infamous or not—depends upon the place of imprisonment. Imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment.

> *Ex parte Wilson*, 114 U. S., 417, 428.
> *Mackin* v. *United States*, 117 U. S., 348, 352.
> *United States* v. *De Walt*, 128 U. S., 393.

The records of this court show that Dimmick was not confined under the judgment in the county jail prior to his removal to the State prison, but that said judgment had been superseded pending his appeals.

In his petition for a writ of certiorari to the circuit court of appeals for the ninth circuit, filed in this court February 2, 1903 (No. 592, October term, 1902, Walter N. Dimmick *v.* United States), for the purpose of obtaining a review of the case in which the judgment

in question was rendered, the petitioner, by his counsel, after reciting the verdict of the jury, said (petition, 16, 17):

> To which verdict, so far as the same is against him, the defendant then and there duly excepted. That thereafter, and on the 16th day of October, A. D. 1901, the said district court denied your petitioner's motion in arrest of judgment, to which ruling he duly excepted, and sentenced your petitioner to imprisonment in the penitentiary at hard labor for the term of two years; that thereafter, and on the 17th day of October, A. D. 1901, your petitioner sued out and served and there was allowed him a writ of error upon said judgment from the United States circuit court of appeals for the ninth circuit, *and obtained a supersedeas on said writ of error and addressed to said judgment;* that thereafter, and on the 18th day of December, A. D. 1901, the record upon said writ of error, as well as the cause itself, were filed and docketed in the United States circuit court of appeals for the ninth circuit.
>
> 3. That thereafter said cause, upon said writ of error, was in due course argued in said circuit court of appeals, before Judges Ross, Hawley, and Gilbert, and submitted to the court for its decision; that subsequently and on the 5th day of May, A. D. 1902, by the decision of the said circuit court ot appeals, in an opinion written and delivered by Judge Ross, the said judgment of the said district court was affirmed; that thereafter and on the 10th day of November, A. D. 1902, the said circuit court of ap-

peals denied your petitioner a rehearing; that to the said judgment of the circuit court of appeals and to the said order denying a rehearing your petitioner duly excepted; that thereafter, to wit, on the 12th day of January, A. D. 1903, the mandate of said circuit court of appeals was filed in the said district court upon said judgment of affirmance; *that on the 13th day of January, A. D. 1903, the said district court ordered that execution of the judgment be stayed for the period of thirty days from that date, to enable your petitioner to make application to your honorable court for a writ of certiorari.*

On page 4 of the record which accompanied Dimmick's petition for certiorari will be found the order of the district court granting a supersedeas upon the judgment in question, and directing his admission to bail.

The petition for certiorari, as well as the petition for habeas corpus which accompanied it, were denied by this court March 2, 1903. (189 U. S., 509.)

The facts thus shown by petitioner's own statement in the former proceeding hardly consist with his present allegation that "from the date of said judgment to the said 13th day of April, A. D. 1903, he was imprisoned *under said judgment* in the county jail of the county of Almeda, *by the order of said court.*"

Courts will take judicial notice of their own records with reference to prior proceedings in the case at bar.

> See A. & E. Ency. Law (2d ed.), p. 925, and numerous English and American cases cited in note.

An appellate court will take judicial notice of its own record on a former appeal.

> *Gans* v. *Holland*, 37 Ark., 483.
> *Bell* v. *Williams*, 10 La., 514.
> *Thornton* v. *Webb*, 13 Minn., 498.
> *Dawson* v. *Dawson*, 29 Mo. App., 521.

This court also has held that it will take judicial notice of its own records on a former appeal.

> *Bienville Water Supply Co.* v. *Mobile*, 186 U. S., 212, 217.

The time a convicted party is detained pending his appeal does not run upon the sentence, even where no supersedeas is granted.

Exactly the same case as that here presented, except that no supersedeas was granted upon the judgment, was *Ex parte Duckett* (15 S. C., 210). Being right in point, I quote from it at length. Duckett had been sentenced by the county court to be imprisoned "in the State penitentiary, at hard labor, for the term of two years from this date, February 27, 1879." Pending his appeal to the Supreme Court, he was detained in the county jail. Upon an application for habeas corpus upon the ground, among others, that his sentence had expired two years from its date, the supreme court of South Carolina said (15 S. C., 211–213):

> The petitioners were delivered to the superintendent of the penitentiary, July 31, 1879, under the sentence that they should be "each imprisoned in the State penitentiary at hard labor for the term of two years." Two years

from the time they reached the penitentiary will not have expired until July 31, 1881, so that it is clear that the petitioners have not served out the time *in the State penitentiary* to which they were sentenced.

But in framing the sentence these words were added: "From this date, February 27, 1879," and it is urged that this being a matter touching the liberty of the citizen, the sentence should be construed literally, and that the two years' imprisonment in the penitentiary must be considered to have commenced at the date of the sentence, February 27, although the parties were not actually lodged in the penitentiary until July 31, 1879.

The judgment, though pronounced by the judge, is not his determination, but that of the law, which depends not upon the arbitrary opinion of the judge, but the settled and irreversible principles of justice. The substance of the sentence was that the petitioners should be "imprisoned in the State penitentiary, at hard labor, for the term of two years," and the date of the sentence, as also the time when it was directed to be carried into effect, was not of the essence of the sentence, but merely directory. Mr. Bishop lays down the law as follows: "Though the sentence to imprisonment ought properly to specify at what time it is to be carried out, yet *time is not of the essence of such a sentence.* Therefore a defendant who had been convicted of an assault was sentenced to imprisonment for two calendar months, 'from and after the 1st day of November next,' but did

not go into prison according to the sentence, and, at a subsquent term, it was decided that the sentence for two months' imprisonment be immediately executed; the proceeding was held to be correct." 1 *Bishop* on *Cr. Proc.*, sec. 878; *Kelly* v. *State*, 3 *Smedes & M.*, 518; *State* v. *Cockerham*, 2 *Ired. L.*, 204. In the case last cited, Judge Gaston, with great clearness, said: "The time at which a sentence shall be carried into execution forms no part of the judgement of the court. The judgment is the penalty of the law as declared by the court, while the direction with respect to carrying it into effect is in the nature of an award of execution. In this case the judgment was that the defendant be imprisoned two *calendar months*, and the words which follow in the record, 'from and after the 1st of November next,' direct the *time* of executing the judgment. The entry, indeed, would have been more formal had the judgment and the mandate for carrying it into effect been separate and distinct. But, however informal, it can be understood in conforming to the law as consisting of distinct parts, and, therefore, ought to be so understood."

So, in this case, the sentence was that the petitioners should be "imprisoned in the penitentiary, at hard labor, for the term of two years," while the direction with respect to carrying it into effect is in the nature of a mandate of execution.

This doctrine applies most appropriately to the case at bar. The absence of these parties from the penitentiary after sentence and before

July 31, 1879, was the result of their own act. They can not say that they were undergoing part of their sentence during that time. They had the right to appeal, and the delay of five months was caused by their exercising their right of appeal to this court for the purpose of arresting the judgment, which had to be pronounced before their appeal could be heard. (*State* v. *Rankin*, 3 S. C., 438.) During the time the appeal was being prosecuted the sentence was practically suspended, for it was proper not to enforce it pending appeal, the result of which might have been to reverse the judgment. The time spent in jail at Laurens, after sentence, can not be considered as in part execution of the sentence to "imprisonment in the penitentiary." It would have been false imprisonment to have detained them there under that sentence. They were there when they were convicted, and simply remained there awaiting the final determination of their trial, which was not ended until their appeal was dismissed. They did not commence to carry out the sentence until that time, July 28, 1879, when for the first time it was proper to enforce the sentence. The delay was as much their own act as if they had escaped confinement during the intermediate time. * * * We do not think the petitioners have served out "in the penitentiary" their full sentence of two years.

In *Ex parte Espalla* (109 Ala., 92) it was held that a convict confined in jail under sentence of imprisonment in the penitentiary was not entitled to be discharged from custody when the failure to remove him to the

penitentiary for the execution of his sentence was occasioned by his application for a writ of *habeas corpus*. In that case the supreme court of Alabama said (pp. 94–95):

> Why the authorities did not appear in Mobile sooner than the 23d to take petitioner to the penitentiary, we are not informed, and it is not necessary for us to decide whether for that reason there was any unlawful delay in the execution of the sentence or not; but one thing is manifest—that the petitioner is now complaining that he was not transferred on the 23d of January, and that he alone is to blame for the fact that he was not so transferred. He produced the delay and now complains of it; and, from the whole proceeding, it is not clear that he did not sue out the writ before Judge Williams for the very purpose of keeping himself from being taken to the penitentiary, a proceeding which, without dismissing, he repudiated by his subsequent applications, as having been granted by a judge who had no jurisdiction of the subject-matter. His case wears the appearance of an attempt to escape punishment on grounds which do not address themselves to us with favor. We see no reason for interfering, on what is before us, by our writ of *habeas corpus*.

A careful search has failed to discover any cases in which the rule has been held to be otherwise than as above stated, where the delay in executing the sentence was occasioned by appellate proceedings on the part of the convicted party.

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The rule announced in the Mills case (135 U. S., 263), that a sentence to imprisonment in the penitentiary must be for a longer period than one year, has no application.

Petitioner *was* sentenced for a longer period than one year.

In the Mills case there were not only two indictments, but two separate and distinct sentences, one for a year and the other for six months.

In this case the district court gave but one sentence for two years upon the verdict of conviction. The fact that petitioner was convicted upon two counts is wholly immaterial, even if each count is to be treated as a separate indictment. For aught that appears, the court may have sentenced upon one count only and disregarded the verdict of conviction upon the other. So, too, if one count of the indictment were defective, the conviction on the other would be sufficient to support the judgment and sentence.

Claasen v. *United States*, 142 U. S., 140, 146.
Evans v. *United States*, 153 U. S., 584, 608.
Dimmick v. *United States*, 116 Fed. Rep., 825.

This court can not undertake to divide and distribute the sentence between the two counts.

If the sentence is erroneous in this respect, opportunity should be given the United States to have Dimmick resentenced in accordance with law upon the verdict against him.

In re Bonner, 151 U. S., 242, 262.
Haynes v. *United States*, 101 Fed., 817, 820.
Jackson v. *United States*, 102 Fed., 473, 490.

The question whether the facts charged in the indictment constituted an offense under the statute are not open to review on habeas corpus, since the district court had general jurisdiction of the class of offenses to which it belonged.

Ex parte Parks, 93 U. S., 18.
Ex parte Watkins, 3 Pet., 193.
Ex parte Yarbrough, 110 U. S., 651.
In re Coy, 127 U. S., 731.
In re Eckhart, 166 U. S., 481.

In *Ex parte Parks*, the court, speaking by Mr. Justice Bradley, said (93 U. S., 20):

> Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States), is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court; and no such writ lies in this case. It would be an assumption of authority by this court, by means of the writ of habeas corpus, to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment.

In *Ex parte Watkins* Chief Justice Marshall, after stating that a commitment by the judgment of a court of competent jurisdiction is a sufficient answer to a writ of habeas corpus intended to effect his discharge, said (3 Pet., 202, 203):

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> The judgment of a court of record whose jurisdiction is final is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact by deciding it. The counsel for the prisoner admit the application of these principles to a case in which the indictment alleges a crime cognizable in the court by which the judgment was pronounced, but they deny their application to a case in which the indictment charges an offense not punishable criminally according to the law of the land. *But with what propriety can this court look into the indictment?* We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment can not be unlawful, unless that judgment be an absolute nullity; *and it is not a nullity if the* court has general jurisdiction of the subject, although it should be erroneous.

In *In re Coy* (127 U. S., 731, 738) it was said that the court would look into an indictment on an application for habeas corpus to see whether it charges an offense within the general jurisdiction of the trial court; but that "if the statute has invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses, as forgery of its bonds or perjury in its courts, *its judgment as to what acts were*

necessary under these statutes to constitute the crime is not reviewable on a writ of habeas corpus." The court further said (127 U. S., 738):

> While we have attempted to answer the main argument of prisoners' counsel, that Congress had no power to punish an act not specifically intended to affect the election of a member of Congress, though the act was done with a felonious intent, and that if it has such power it has not exercised it, we thought it not necessary, under the principle laid down in *Ex parte Watkins*, to inquire into the sufficiency of the allegation of the more minute details of the offense as charged in the indictment. We are not here to consider it as on a demurrer before trial; but, *finding that the district court has a general jurisdiction of this class of offenses*, we proceed no further in the inquiries on that subject.

In *In re Eckhart*, where it was held that an error committed by the trial court in passing sentence was not a jurisdictional defect reviewable by habeas corpus, Mr. Justice White, speaking for the court, said (166 U. S., 481):

> The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offense against the statute claimed to have been violated. In this class of cases it has been held that a trial court *possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment* is possessed of authority

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to determine the sufficiency of an indictment, and that, in adjudging it to be valid and sufficient, acts within its jurisdiction and a conviction and judgment thereunder can not be questioned on habeas corpus, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime.

The judgment and order appealed from should be affirmed.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court of the United States.

No. 528.—October Term, 1903.

Walter N. Dimmick, Appellant,
vs.
John W. Tompkins, Warden of the State Prison of the State of California, at San Quentin.

Appeal from the Circuit Court of the United States for the Northern District of California.

[May 31, 1904.]

Dimmick, the appellant, presented his petition for a writ of *habeas corpus* to the Circuit Court of the United States, Northern District of California. The petition was denied and an appeal taken to this court from the order denying the application. The appellant alleged in his petition for the writ that he was unlawfully imprisoned in the State prison of the State of California; that the imprisonment was illegal and in contravention of the Constitution of the United States, Article Five of the amendments to the same; that on October 16, 1901, he was sentenced to imprisonment in the State prison by the District Court of the United States in and for the Northern District of California for the period of two years, to date from the 16th day of October, 1901; that he had been imprisoned, under the judgment, in the State prison ever since April 13, 1903, and that prior thereto, and from the date of the judgment to April 13, 1903, he was imprisoned, under said judgment, in the county jail of the county of Alameda by the order of the District Court.

The appellant also alleged that, notwithstanding the foregoing facts, the warden refused to discharge or release him from imprisonment, although the term of said imprisonment expired, according to its terms, on October 16, 1903. The appellant then set forth in the petition a copy of the record of the proceedings of the District Court of the United States, which showed that he was convicted in the District Court on the 16th of October, 1901, of making and presenting a false claim, as charged in the first count of the indictment, and of using a portion of the public moneys of the United States for a purpose not prescribed by law, as charged in the fourth count; and that he was sentenced "to be imprisoned at hard labor for the term two years from October 16, 1901; and it is further ordered that said sentence of imprisonment be executed upon the said Walter N. Dimmick by imprisonment in the State prison of the State of California, at San Quentin, Marin County, California."

The record was signed by the district judge who held the court.

The petition also set forth a copy of the indictment under which the trial was had. It was founded upon sections 5438 and 5497 of the United States Revised Statutes, and charged in substance the presentation to the cashier of the mint at San Francisco of a certain false, fictitious and fraudulent claim against the United States and known to be fraudulent by the defendant at the time he presented it; also, with having unlawfully used a portion of the public moneys for a purpose not prescribed by law. The appellant averred that neither the first nor the fourth count charged any crime or publice offence against the United States nor the violation of any law of the United States, and that both counts were fatally defective. The appellant also averred that the judgment of the court, in as far as it required his imprisonment in the State prison, was void, because the United States District Court sentenced him for one year, and no more, upon each of the two counts of the indictment referred to in the judgment, and did not sentence him to imprisonment for a period of more than one year upon each of said counts, and that a sentence to the State prison for a period of not more than one year violated the statutes of the United States.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The appeal directly to this court from the decision of the Circuit Court denying the writ of *habeas corpus* was proper under the averments contained in the petition, that the imprisonment of the appellant was in violation of the Federal Constitution. (*Craemer* v. *Washington State*, 168 U. S. 124, 127.)

The appellant contends that, as his sentence was imprisonment "at hard labor for the term of two years from October 16, 1901," his term of imprisonment under that sentence necessarily expired by its own limitation on October 16, 1903, even without any deduction for credits earned by good behavior.

If the appellant had been at once transported to the State prison under the sentence imposed upon him after his conviction, it is of course plain that two years from the time of his sentence (if he remained there in the meantime) would be the extent of his legal detention. In fact, he was not taken to the State prison until April 13, 1903, but he avers that he had been previously and from October 16, 1901, the date of the judgment, to April 13, 1903, imprisoned under said judgment in the county jail of the county of Alameda, by the order of said District Court. The sentence upon the verdict of guilty is given in the record, which is made a part of the petition, and that record shows that the appellant was "sentenced to be imprisoned at hard labor for the term of two years from October 16, 1901; and it is further ordered that said sentence of imprisonment be

executed upon the said Walter N. Dimmick by imprisonment in the State prison of the State of California, at San Quentin, Marin County, California."

The imprisonment of the appellant in the county jail could not, therefore, have been under the judgment which prescribes imprisonment in the State prison. But such detention may have been owing to his efforts to obtain a review and reversal of the judgment and in the meantime a supersedeas thereon, so as to prevent his transportation to the State prison, and in that case such detention should not be counted as any part of the time of imprisonment in the State prison. In that event his imprisonment in the State prison, under the judgment, should be counted from the time it actually commenced, notwithstanding the statement of the sentence that it should be for two years from October 16, 1901. The time of commencement was postponed by his own action, and he cannot take advantage of it and thus shorten the term of his imprisonment *at hard labor in the State prison.*

Upon this writ the question to be examined is one of jurisdiction, and in this case it is whether the warden of the prison has the legal right to continue the imprisonment under the sentence and warrant of commitment notwithstanding the expiration of two years from the time of sentence. If, as we have said, the detention in the jail was the result of his own action, and his imprisonment at hard labor in the State prison did not, for that reason, commence until April 13, 1903, then the legal term of his imprisonment in the State prison has not expired and he is properly detained. As it was incumbent upon the appellant to show his continued imprisonment was illegal, (there being no presumption that it was,) the duty and the burden rested upon him to aver, and, if the averment were traversed, to prove that his detention in jail had not been by reason of the fact suggested. This he has not done. There is no such averment in the petition for the writ and there is no proof of such fact to be found. *Non constat*, that he was not detained for the very reason already stated. This is fatal to the appellant, so far as this point is concerned.

As might be surmised, there was ample reason for not making the allegation. It would not have been true.

It appears from our own records that a petition for a certiorari was filed in this court by appellant February 2, 1903, asking for a review of the above-mentioned judgment, and in that petition it is stated that the appellant had taken proceedings to have the judgment reviewed by the Circuit Court of Appeals, and had obtained a supersedeas thereon, and after the judgment had been affirmed by that court and on January 13, 1903, the District Court ordered the execution of the judgment thus affirmed to be stayed for the period of thirty days from that date to enable the appellant to make application to this court for a writ of certiorari,

which application was made, and denied by this court March 2, 1903. (189 U. S. 509.) In a case like this the court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it. The principle permitting it is announced in the following cases: *Butler* v. *Eaton*, (141 U. S. 240, 242;) *Craemer* v. *Washington State*, (168 Id. 124, 129;) *Bienville Water Supply Company* v. *Mobile*, (186 Id. 212, 217.)

That the party seeking to review a judgment of imprisonment in a State prison cannot take advantage of his own action in so doing as to thereby shorten the term of imprisonment in the State prison is, as we think, plain. To hold otherwise would be inconsistent with the general principle that a person shall not be permitted to take advantage of any act of another which was committed upon his own request or was caused by his own conduct. See *McElvanie* v. *Brush*, (142 U. S. 155, 159.) The question has arisen in some of the State courts and has been so decided. See *Ex parte Duckett*, (15 S. C. 210,) decided in 1881; *Ex parte Espalla*, (109 Ala. 92,) decided in 1896. In such cases the provision of the sentence that the imprisonment is to commence on or to continue from a certain day is rendered impossible of performance by the act of the defendant, and he will not be permitted to obtain an advantage in such manner. The appellant cites no case which questions this principle. Those cited by him have, generally, reference to the construction to be given the language of the sentence as to the time of its commencement. They do not deny the rule as to the action of defendant in preventing its execution.

Johnson v. *The People*, (83 Ill. 431,) is not in point. The case arose on error brought by the defendant after conviction in the court below. He was convicted under several counts of an indictment for selling intoxicating liquors and the sentence fixed a day and hour when the imprisonment should commence under each count. This was held to be error, as the sentence to imprisonment should have been for a specified number of days under each count upon which conviction is had, and the imprisonment under each succeeding count would begin when it ended under the preceding one, without fixing the day or hour of any. It appeared in that case that a supersedeas had been granted, and that it had become impossible that the judgment of imprisonment could be carried into effect, as the time fixed by the court had elapsed. The sentence was held to be an erroneous one, and the judgment was reversed and the case remanded with directions that the court should enter a proper judgment on the verdict.

In *Dolan's case*, (101 Mass. 219,) the prisoner, after imprisonment, had escaped before the term of the sentence had expired, and having been retaken claimed his discharge at the expiration of the time that he would have been entitled to it if he had not escaped. Neither the date of its commencement nor of its expiration was fixed by the terms of the sentence.

His application was denied, and it was held that the defendant must be imprisoned for a time which corresponded with his original sentence, and that the expiration of the time without imprisonment was in no sense an execution of the sentence.

Also, in *State* v. *Cockerham*, (2 Ired. Law, 24 N. C. 204,) it was held that the time at which the sentence should be carried into execution forms no part of the judgment. The judgment is the penalty of the law as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. So here, in the case before us, the material part of the sentence is imprisonment for two years in the State prison, and that sentence is not satisfied by a detention in the county jail for a portion of the two years by reason of the proceedings of appellant to review the judgment under which the sentence was given.

As to the time of the commencement of the sentence, *State* v. *Gaskins*, (65 N. C. 320,) is based upon a statute, which declared that the term of imprisonment "shall begin to run upon and shall include the day of conviction." The question did not arise by reason of the act of the defendant in taking proceedings to review the judgment.

Woodward v. *Murdock*, (124 Ind. 439,) simply holds that the period the prisoner is out of jail under parole is part of the time for which he was sentenced, and when the original time expires he is entitled to his discharge just the same as if he had been in prison the whole time. It was held that he was constructively in prison, although in fact conditionally at large under his parole, and that while thus on parole his sentence ran on.

The sentence given in this case could only have been satisfied by imprisonment in the State prison at San Quentin for the period of time mentioned in the sentence. This is not the case of an arbitrary detention in jail, without excuse or justification, after sentence to imprisonment in a State prison. If in such case the defendant were helpless, the question might arise whether the time of such improper detention in jail should not be counted, as to that extent, a satisfaction of the sentence.

It is also objected that the sentence is void because it directs imprisonment in the State prison for a period that does not exceed one year on each count of the indictment, and *In re Mills*, (135 U. S. 263–268,) is cited to sustain the proposition.

In that case the prisoner was sentenced upon two indictments to imprisonment in the penitentiary, in one case for a year and in the other for six months, and it was held that the imprisonment was in violation of the statutes of the United States. See R. S. 5541, 5546, 5547.

In the case at bar the sentence was for two years upon one indictment, and there is no statement in the record that there was a separate sentence each for one year upon the first and fourth counts of the indictment. In

this we think there was no violation of the statute, and the sentence was therefore proper and legal. The appellant may have been sentenced upon one count only for two years. Although for some purposes the different counts in an indictment may be regarded as so far separate as to be in effect two different indictments, yet it is not true necessarily and in all cases. But this record shows a sentence for two years to the State prison, and there is nothing to show the court was without jurisdiction to impose such sentence for the crime of which the defendant was convicted.

It is also objected that the facts charged in either the first or fourth count of the indictment did not constitute any offence under the statute, and that the sentence was therefore without jurisdiction. We are not by any means prepared to adjudge that the indictment did not properly charge an offence in both the first and fourth counts. See *Dimmick* v. *United States*, (116 Fed. 825,) involving this indictment, where it is set forth. It is not, however, necessary in this case to decide the point, for the indictment charged enough to show the general character of the crime, and that it was within the jurisdiction of the court to try and to punish for the offence sought to be set forth in the indictment. If it erroneously held that the indictment was sufficient to charge the offence, the decision was within the jurisdiction of the court to make, and could not be re-examined on *habeas corpus*. The writ cannot be made to do the office of a writ of error. Even though there were, therefore, a lack of technical precision in the indictment in failing to charge with sufficient certainty and fullness some particular fact, the holding by the trial court that the indictment was sufficient would be simply an error of law, and not one which could be re-examined on *habeas corpus*. (*Ex parte Parks*, 93 U. S. 18; *In re Coy*, 137 Id. 31; *In re Eckert*, 166 Id. 481.) In the last case it was stated that (page 483)—

"The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offence against the statute claimed to have been violated. In this class of cases it has been held that a trial court possessing general jurisdiction of the class of offences within which is embraced the crime sought to be set forth in the indictment, is possessed of authority to determine the sufficiency of an indictment, and that, in adjudging it to be valid and sufficient, acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on *habeas corpus*, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime."

The order refusing the writ was right, and is *Affirmed.*

END OF CASE